

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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UNITED STATES OF AMERICA,

Plaintiff(s),

v.

KIRK ANTHONY BOWMAN,

Defendant(s).

Case No. 2:13-CR-307 JCM (CWH)

ORDER

Presently before the court is Kirk A. Bowman's ("defendant") motion for compassionate release. (ECF No. 46). The United States of America ("the government") filed a response (ECF No. 48), to which defendant replied (ECF No. 53).

Also before the court is the government's motion to seal exhibits. (ECF No. 49).

I. Background

As relevant to this motion, pursuant to a plea agreement, defendant pleaded guilty to five counts of bank robbery and one count of attempted bank robbery. (ECF Nos. 23; 24). On March 17, 2014, the court sentenced defendant to 151 months' incarceration per count, all to run concurrently with one another. (ECF Nos. 28; 31).

While defendant has been incarcerated, the novel strain of coronavirus and COVID-19, the resultant respiratory disease, has run rampant throughout the country and the world. While the court need not reiterate the well-known effects COVID-19 has had on day-to-day life, "[s]ome people are more likely than others to become severely ill, which means that they may require hospitalization, intensive care, or a ventilator to help them breathe, or they may even die." *See*

Center for Disease Control, *People Who Are at Increased Risk for Severe Illness*, (June 25, 2020).¹
 People with certain underlying medical conditions are particularly susceptible to COVID-19.
 Center for Disease Control, *People with Certain Medical Conditions*, (July 17, 2020).²

The CDC's list of at-risk persons has expanded, and new studies on COVID-19 vis-à-vis
 comorbidities continue to be promulgated. *Id.*; see also, e.g., Xianxian Zhao, et al., *Incidence,
 clinical characteristics and prognostic factor of patients with COVID-19: a systematic review and
 meta-analysis* (March 20, 2020);³ Safiya Richardson, et al., *Presenting Characteristics,
 Comorbidities, and Outcomes Among 5700 Patients Hospitalized With COVID-19 in the New York
 City Area* (April 22, 2020).⁴

Defendant now moves this court to grant him compassionate release, arguing that his age
 (55), Hepatitis C, asthma, hypertension, and sleep apnea place him at heightened risk of
 contracting and acutely suffering from COVID-19. (ECF No. 46). Defendant also notes that, of
 his 12-and-a-half-year sentence, he has already been incarcerated for 7 years. *Id.* The government
 opposes the motion, arguing that defendant's medical conditions are not sufficiently
 "extraordinary and compelling" and that he poses a danger to the community. (ECF No. 48).

II. Legal Standard

"Even though courts ordinarily have the inherent authority to reconsider its [their] prior
 orders, such authority does not exist when there is an 'express rule to the contrary.'" *United States
 v. Barragan-Mendoza*, 174 F.3d 1024, 1028 (9th Cir. 1999). One such contrary rule is relevant
 here: "A court generally may not correct or modify a prison sentence once it has been imposed."
United States v. Penna, 319 F.3d 509, 511 (9th Cir. 2003) (citing 18 U.S.C. § 3582(c)). Instead,
 the court may modify a sentence only when expressly authorized by statute.

¹ Available at <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-increased-risk.html>.

² Available at <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html>.

³ Available at <https://www.medrxiv.org/content/10.1101/2020.03.17.20037572v1.full.pdf>.

⁴ Available at <https://jamanetwork.com/journals/jama/fullarticle/2765184>.

1 The court is expressly authorized to modify a sentence under the compassionate release
 2 provision of 18 U.S.C. § 3582(c)(1)(A), as amended by the First Step Act, Pub. L. No. 115-391,
 3 132 Stat. 5194 (Dec. 21, 2018). 18 U.S.C. § 3582(c)(1)(A). However, courts may consider
 4 compassionate release only “upon motion of the Director of the Bureau of Prisons” *Id.* If a
 5 defendant wants to file such a motion with the court, he must fully exhaust his administrative
 6 remedies before doing so. *Id.* Since the enactment of the First Step Act, a defendant may file a
 7 compassionate-release motion if his application to the BOP goes unanswered for thirty days. *Id.*

8 To be eligible for compassionate release, a defendant must demonstrate: (1) the existence
 9 of extraordinary and compelling reasons, and (2) that he is not a danger to the community. 18
 10 U.S.C. § 3582(c)(1)(A); U.S. Sentencing Guidelines Manual § 1B1.13 (2018). Under U.S.
 11 Sentencing Guidelines Manual § 1B1.13, “extraordinary and compelling reasons” include,
 12 amongst other things, terminal illnesses and medical conditions “that substantially diminishes the
 13 ability of the defendant to provide self-care within the environment of a correctional facility and
 14 from which he or she is not expected to recover.” U.S. Sentencing Guidelines Manual § 1B1.13
 15 (2018).

16 **III. Discussion**

17 As an initial matter, the government moves to seal defendant’s medical records. (ECF No.
 18 49). The court finds that this sensitive medical information is traditionally kept secret and therefore
 19 properly filed under seal. *See Kamakana v. City & Cnty. of Honolulu*, 447 F.3d 1172, 1178 (9th
 20 Cir. 2006). The grants the government’s motion to seal accordingly.

21 First, the government concedes that “[t]his [c]ourt may consider [defendant’s] motion”
 22 because more than 30 days have passed since he petitioned the warden of his facility for release.
 23 (ECF No. 48 at 5). Thus, the court turns to the two-prong analysis under 18 U.S.C.
 24 § 3582(c)(1)(A)—both prongs of which the government disputes.

25 The bulk of defendant’s motion discusses the national COVID-19 pandemic and the BOP’s
 26 response thereto in general terms. (*See generally* ECF No. 46). Defendant’s discussion of his
 27 underlying medical conditions is limited to a single paragraph as follows:

28 Mr. Bowman is 55 years old. BOP medical records confirm Mr.
 Bowman has Hepatitis C.¹¹ He has hypertension and receives daily

1 medication.¹² Mr. Bowman has asthma for which is prescribed an
 2 Albuterol Inhaler. Mr. Bowman also suffers from sleep apnea.¹³
 3 Individually and as a result of the combination of his medical
 4 conditions, Mr. Bowman is at increased risk of contracting COVID-
 19 and of heightened risk of serious illness or death from COVID-
 19.

5 *Id.* at 8.

6 The government urges that these conditions are neither extraordinary nor compelling.
 7 (ECF No. 48 at 12–16). The government notes that defendant’s “Hepatitis C, though diagnosed
 8 in 1999, was characterized as ‘asymptomatic’ as recently as August of last year.” *Id.* at 14.
 9 Further, defendant admits that “treatment to completely cure Hepatitis C exists and is available in
 10 the BOP,” but argues that he “has still not been provided treatment.” (ECF No. 53 at 5).

11 Both parties concede that defendant’s “hypertension and asthma are managed with
 12 medication.” (ECF Nos. 46 at 8; 48 at 14). Further, the government notes that his hypertension is
 13 “benign” (ECF No. 48 at 14), a point that defendant does not dispute (ECF No. 46).⁵

14 Defendant’s medical conditions are adequately managed by the BOP. The court concludes
 15 that defendant’s conditions do not “substantially diminishes the ability of the defendant to provide
 16 self-care within the environment of a correctional facility and from which he or she is not expected
 17 to recover.” U.S. Sentencing Guidelines Manual § 1B1.13 (2018). The court denies defendant’s
 18 motion.

19 Even assuming that defendant’s conditions, in the aggregate, rise to the level of
 20 “extraordinary and compelling” reasons for compassionate release, defendant’s extensive history
 21 of violent crime militates against compassionate release. On this point, defendant advances three
 22 arguments: (1) his criminal history was driven by a drug addiction, for which he has received
 23 treatment; (2) his age and 7 years of incarceration mean he is unlikely to reoffend; and (3) any
 24 danger to the community can be mitigated by terms of supervised release. (ECF No. 46 at 15–16;

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 26 ⁵ The court notes that *pulmonary* hypertension increases a person’s COVID-19 risk.
 27 Center for Disease Control, *People with Certain Medical Conditions*, (July 17, 2020). Simple
 28 hypertension (high blood pressure), however, “may” increase COVID-19 risk, but can be managed
 by medication. *Id.* Defendant contends that he has hypertension and does not specify whether is
 pulmonary hypertension or not. (ECF No. 46). Regardless, defendant concedes that his condition
 is managed by medication. *Id.*; (see also ECF No. 53).

1 53 at 4). However, defendant tacitly concedes that he poses a danger to the community: “Mr.
2 Bowman asks this [c]ourt to find he poses a risk that can be addressed with conditions under the
3 third criterion.” (ECF No. 46 at 16).

4 The government argues that neither defendant’s prior drug treatment nor his “prior
5 convictions and sentences were enough to stop [him] from continuing to break the law.” (ECF
6 No. 48 at 17). The government also notes that defendant “has failed to comply with conditions of
7 supervision in the past,” including committing criminal acts while on supervision that resulted in
8 further convictions. *Id.* at 17–18.

9 The court finds that defendant poses a danger to the community and denies his motion on
10 this ground as well.

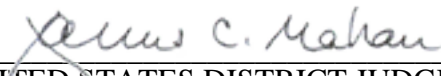
11 **IV. Conclusion**

12 Accordingly,

13 IT IS HEREBY ORDERED, ADJUDGED, and DECREED that defendant’s motion for
14 compassionate release (ECF No. 46) be, and the same hereby is, DENIED.

15 IT IS FURTHER ORDERED that the government’s motion to seal (ECF No. 49) be, and
16 the same hereby is, GRANTED.

17 DATED July 27, 2020.

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20 UNITED STATES DISTRICT JUDGE
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